Machinery attached to the soil by bolts and nuts is *prima facie* land". The Court clearly applied the English law but the furthest the learned Chief Justice seems to have gone in support of the second proposition is at page 101 where he says :—

> In the Court below it appears to have been assumed that the onus of proving these machines to be fixtures rested on the chargee and Mr. Forwell's evidence seems to be all in favour in the endeavour to afford this proof. This would have been a correct standpoint had all the machines merely rested on the ground with no fastenings. They would then have appeared to be chattels and the onus of proof would rest on those who asserted they had ceased to be chattels but "an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to show that it was intended all along to continue a chattel, the onus lying on those who contend it is a chattel," **Holland v. Hodgson** 7 C.P. at page 335. In this case there is no evidence before the Court which could justify it in finding that this onus had been discharged and the machines were chattels.

The result of the English cases seems to be best summed-up in *Woodfall's* Law of Landlord and Tenant 24th Edition on page 753 which seems to state more generally what the F.M.S. Appeal Court applied to the particular case. It reads as follows :—

> Whether a machine or any other article has been so fixed and attached to the freehold as to become parcel of it, is a question depending on the circumstances of each case, but when once those circumstances are determined, the question will be one of law. The two principal circumstances are: first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed **integre, salve et commode,** or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, **perpetui usus causa,** or in that of the Year Book, **per unprofit del inheritance,** or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel. If machines be attached slightly by screws or otherwise, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels, they do not become "fixtures" or part of the freehold.

The uncertainty as to the meaning of the word "fixture" is due to the large element of fact. No particular evidence on that matter seems to have been taken in this case but as it stands there seems to be good reason for saying that this mill is not an article within the terms of the provision as to confiscation in the Food Control Proclamation. It is a matter however on which a finding would be necessary. In this case moreover the appellant was not the owner and I do not think the fact that he was part owner would satisfy this provision when strictly construed. As however I think the conviction was wrong this point does not directly arise. The result therefore is that the conviction of the Court below is quashed.

Appeal Allowed.

YAU WAH FONG v. NG TAI NEE AND 10 OTHERS.

[Original Civil Jurisdiction (Evans, J.) July 26, 1947]

Japanese Judgments and Civil Proceedings Ordinance 1946 Section 3 — Application for leave to appeal from a Japanese Judgment — Jurisdiction of Court to set aside judgment — Absence of evidence of judgment — F.M.S. Courts Enactment Section 25.

In this case the applicant originally brought a motion for leave to appeal against a Japanese judgment dated the 12th January 2604 whereby the applicant's claim for a declaration was dismissed. Subsequently, the applicant gave notice to the respondents of an amendment of the motion by which he sought to have the judgment referred to set aside. The grounds put forward by the applicant were (i) that the issues before the Japanese Court were incorrectly recorded (ii) that there was no judgment and therefore it is difficult to know what the Japanese Court decided (iii) that there had been a mistake by the plaintiff's principal witness at the trial (iv) that fresh evidence tending to prove fraud had been discovered.

Held, that in the circumstances of the case the proper course for the Court to take was to set aside the Japanese Judgment, which it had power to do under Section 3 (2) of the Japanese Judgments and Civil Proceedings Ordinance.

Cases referred to :—

(1) *Kumar Ramenda Narayan Roy v. Bibhabati Devi and others*
(2) *Abraham v. Dimmock* (1915) 1 K.B. 662.
(3) *Chertsey U. D. .C. v. Binns* (1905) 49 S.J. 223.
(4) *Higginson v. Blackwell Colliery Company* (1915) L.J. K.B. 1189.
(5) *Cross and others v. Gray, Dawes and Company* 5 T.L.R. 377.

MOTION FOR LEAVE TO APPEAL.

F. G. Bryand and E. D. Shearn for Applicant.

Cheang Lee and Ong for Respondents Nos. 1 — 10.

K. G. Suppiah for Respondent No. 11.

Evans, J. : — This motion was originally brought by the appellant for leave to appeal against the Japanese Judgment of 12th Januray, 2604 whereby the applicant's claim for a declaration was dismissed. Since it was filed, notice was given to the respondents of an amendment by which he sought to have the judgment referred to set aside. That notice has been accepted and the matter comes to the Court on that basis. The motion for leave to appeal is not opposed.

This motion is made under section 3 of the Japanese Judgments and Civil Proceedings Ordinance,

1946. The grounds put forward by the applicant are: In the first place, he complains that the issues before the Japanese court were incorrectly recorded, and that, whereas there were admittedly three issues, the judge made a note that "the issue is: Is the sum of $37,647 a reasonable price" and omitted all reference to the other issues which were not specifically waived. Those issues were collusion and fraud. Fraud at least is referred to in the final speech of the Counsel for the plaintiff. The second ground is that there is no judgment, and therefore it is difficult to know what the Japanese Court decided. The third ground is based on the affidavit made by Mr. Perkins, who at the trial was the plaintiff's principal witness as to the value and who now declares that he made a mistake in giving evidence; and finally on the ground that fresh evidence tending to prove fraud had been discovered in the fact that the defendants have failed to register the transfer from 1st — 10th defendants to the 11th defendant.

Section 3 of the Ordinance under which the motion is brought gives this Court power either to set aside, or to grant liberty to appeal against a Japanese decree by which the applicant is aggrieved. Sub-section 4 of that section outlines more particularly cases in which the judgment may be set aside. The expression "set aside" is frequently used in speaking of setting aside by a Court of a previous judgment of that same Court upon grounds some of them analogous to those set out in sub-section (4). It is however equally used to describe one of the powers and a general power of the Court of Appeal and I do not think that the use of this expression is intended to imply that liberty to appeal should be given in all cases where an appeal might lie from this Court and that only such decrees should be set aside as might have been set aside by this Court, had they been decrees of this Court. To set aside has no such definite connotation. The provisions of sub-section (4) are quite independent of such considerations arising out of the existing law and confer upon this Court entirely new powers.

It has been argued that the power of the Court to set aside is limited to the cases referred to in sub-section (a) (b) and (c) of sub-section (4) and that Sub-section (d) has to be construed under the *ejusdem generis* rule. The Court's powers would thus be even more restricted than they would be, if it had power to set aside in all cases where it might set aside its own judgments. This construction is, in my opinion, inconsistent with the opening words of this sub-section which reads "without prejudice to the generality of the provisions of sub-section (2) of this section". The exact meaning of these words is obscured by the wording of sub-section (2) the powers conferred by which are said to be "subject to the provisions of this section" and it would therefore seem, subject to the provisions of sub-section (4). There are, however, other provisions in the section to which sub-section (2) can be read as subject. On the other hand the opening words of sub-section (4) are particular and refer to sub-section (2) specifically. They clearly contemplate that sub-section (2) confers wider powers than sub-section (4) would otherwise apparently confer. Reading this section as a whole I think it confers power on this Court to make either order and in doing so the Court should consider which is the more appropriate remedy in the circumstances of the case.

Mr. Ong, who is the only counsel here who was in the Court below states, that all the issues were abandoned by the plaintiff except that whether the price paid was or was not reasonable in the circumstances, and points to the commencement of the Judge's note recording his address. After listening to him, however, I am at some loss to know what issues he suggests the Judge decided. It is quite clear that Mr. Mahendran who then appeared for the 11th defendant, addressed the Court on the question of fraud. There is no note of the plaintiff expressly abandoning any issue.

The first two grounds put forward by the applicant appear to me to be two aspects of the same thing. Had there been a written judgment in this case that judgment would have been conclusive and the final indication of what in fact the Judge considered, what issues he thought arose, and what issues he decided. As to the recording of the issues, the Judge merely made a note regarding counsel's speech; that is not pleading and it might be amplified by other evidence of what happened and would be cured by a judgment, if this showed that all the issues had been considered. Compared to this objection the other points appear to me to be of minor importance. The Court of Appeal receiving the case in the condition it now is, would it seems to me have no other course open to it but to order a re-trial of all the issues.

For this reason Mr. Shearn says that the Court should set aside the judgment rather than allow an appeal in order to avoid unnecessary litigation. I agree with the view, and it seems to me to be one of the matters which should be taken into consideration as indicating which of the two remedies provided would be more appropriate. In the circumstances in which this jurisdiction must be exercised in this country it is

not unlikely that insufficiency or incompleteness of record may be found to exist in a number of cases.

This aspect of the case was however materially altered by Mr. Ong's production of a letter which appears inconsistent with the statement of the plaintiff that they had been assured by the person who tried this case for the Japanese that no judgment could be had. This letter was one from Mr. Ong to Mr. Ismail Khan. In it he quotes paragraph 6 of the applicant's affidavit of the 30th May and asks whether the plaintiff offered to supply Notes of Evidence and Exhibits when asking for a judgment, and offers himself to do so. To this letter he stated he received a reply that Mr. Ismail Khan is prepared to write a judgment if directed by the Court. In his reply Mr. Shearn questioned whether Mr. Ismail Khan whose office has ceased to exist, could now give judgment in the matter. No authority was cited although reference was made in Court to the case of *Kumar Ramenda Narayan Roy v. Bibhabati Devi and others*[1] in which case Mr. Justice Biswas expressed strong and decided views against the validity of a judgment by a Judge who had retired from office. The expression was, however, one of a personal opinion, and was quite irrelevant to the actual decision of the case. I thought it right however to give further consideration to this matter.

In the discussion in the Court there was, unfortunately, some latent ambiguity in the use of the word judgment. What is strictly a judgment, and is usually called here a decree, was given in this case. What is wanting here are the reasons for the judgment or what is frequently referred to in this country as a judgment. It would appear from Mr. Ong's letter that something of the kind was given and is referred to in his letter as "a short oral judgment". The real question here is what evidence is there of the judgment given. It is not a question now whether the Judge should re-construct a decision which he might or should have given.

The procedure in different countries and courts differs so frequently in this matter that it is difficult to discover any definite authorities. The authority to which Biswas J. referred was I think Indian Order XX Rule 8. This, however, deals with the converse case, where the judge has vacated office after pronouncing judgment but without signing a decree. In other jurisdictions the decree might be signed by the Master or Registrar and the point would not arise. For the rest I think the Judge must have relied on general principles.

In some Courts the decision, both reasons and judgment, are reduced to writing; in such cases the position would be clear. The nearest analogy I can find are in appeals from English County Court which are not strictly analogous to the Supreme Court here and which are moreover under certain statutory duties as to making a note in certain cases. The difficulty occasioned by the absence of evidence of the judgment given has been considered in several cases. In the case of *Abraham v. Dimmock*[2] the action was heard in a County Court on 10th July, 1913, the matter came before the County Court Judge again on the 17th October, 1913, on a question of accounts and reserved judgment was delivered on 13th November. There was no note of this judgment because the appellant had not asked for one at the time in accordance with the statutory provisions. And further in accordance with the usual practice a certificate was obtained from the County Court Judge dated 1st January, 1914. It was contended that the certificate must be read in place of the lacking note.

The statutory note should be of any point of law raised, of the facts in evidence in relation thereto, of the decision thereon, and of the decision of the action.

Pickford L. J. (as he then was) said at page 679 :—

> It was a case which obviously might present difficulties, and I should have thought that it would have been better if a note had been taken, whether a request was made or not. He (the Judge) did, however, some months afterwards give a certificate which purports to be a history of what had taken place, and it is argued that that must be taken as his note, and that if it did not state that the point was raised it must be taken that it was not. The answer to that seems to me to be quite clear. The certificate is not a note. It is probably the best substitute for a note which the Judge can give us after so many months. It is true that the county court judge does not say a word about the point being raised that the questions whether the interest was excessive and whether the transaction was harsh and unconscionable were for the judge and not for the jury. It is clear, however, from the admissions of counsel that the point was raised. It is agreed by counsel that the county court judge himself took the point.

Phillimore L. J. on this point said in page 675 :—

> It is most desirable that there should be a note, and it is within the discretion of the divisional court to refuse to hear an appeal for some good reason if it is satisfied that there is no note and that no request for a note was made, or it may hear and determine the appeal on any evidence or statement which it deems sufficient. I have known cases heard in the Divisional Court entirely on the admissions of Counsel as to what took place in Court below.

Chertsey U. D. C. v. Binns[3] was a case in which the court ordered a new trial on omission to take a note. Buckley L. J. who presided said at page 669 :—

> The so-called certificate is dated January 1st, 1914, so that the learned judge was at the last mentioned date endeavouring to state to the best of his

recollection matters which had taken place before him some months previously. It is contended that the party appealing from a county court must, where no note is forthcoming, obtain a certificate from the county court judge that he has no note; that nothing else will do.

After citing Order LIX Rule 8 of the Rules of the Supreme Court 1883 he went on :—

> The rule contemplates that the appeal may proceed in the absence of a note by the county court judge; it is for the Court in each case to say whether it is satisfied that it cannot get the best evidence of what took place namely the judge's note. In the present case I am satisfied that there is no note. The county court judge in his certificate, as it is called, says that the newspaper reports are fairly accurate, though somewhat condensed. In these circumstances we have allowed a report in a local newspaper to be used as to what took place before the learned judge. We have therefore no note of the county court judge, but we are satisfied that we have before us in the circumstances the best materials we can obtain for ascertaining what took place before him, and we proceed to act upon them.

In *Higginson v. Blackwell Colliery Company*[4] the county court judge gave an oral judgment and later, on appeal, a written one which Buckley L. J. seems to have thought "something else". This view does not seem to have been shared by the other Lord Justices. Lush J. in the Divisional Court questioned the judge's right to give two judgments to which objection Phillimore L. J. dissented saying there was but one judgment though, may be, two reasons.

In *Cross and others v. Gray, Dawes and Company*[5] the Court of Appeal was prepared to act on a shorthand writer's note verified by affidavits in lieu of the judge's notes. These cases show on what evidence a court of appeal might act, and that evidence may be compared with what is available here.

It is true that in this country a High Court Judge may under Section 25 of the Courts Enactment give a certificate of the grounds of his judgment after it is given and the interval might extend to the time limited in section 18 to wit one month. That is not a long period as compared with those in *Abraham v. Dimmock* of seven weeks, and five and half months, or that in this case of three and half years. That section however did not apply to the courts sitting under the Japanese, and can hardly now apply to Mr. Ismail Khan personally.

Mr. Ismail Khan certainly holds no office and could do no act, which purported to be done by virtue of such. There is no question now of his signing any decree or judgment, but of evidence of the judgment given on 12.1.44, of the facts found therein, of the arguments considered and of the law applied. I do not think it necessary to decide whether he could provide evidence by what might appear to be a judgment or an official act. In his reply to Mr. Ong, Mr. Ismail Khan prefaced his note with the words — "I do not know if it would be proper for me to write a judgment now". This, in any case, is the gist of the matter. The cases cited may not be direct authorities, but they illustrate the difficulties which would beset appeal. It is not here a case of Mr. Ismail Khan writing "some months afterwards" but of some years. In *Abraham v. Dimmock* it will be seen the court preferred a newspaper report. I think the answer to Mr. Ismail Khan's enquiry is in the negative. It is noteworthy that none of the parties, nor even Mr. Ong, who was personally present, professes any clear recollection of the judgment given. And it is abundantly clear that there is no chance of counsel agreeing it. These seem to me considerations which lead to the conclusion that setting aside is the appropriate remedy in this case. On this point the 11th defendant's case cannot be distinguished from that of the other ten. The Japanese decree of 12.1.44 is therefore set aside. Costs to be costs in the cause.

Judgment Set Aside.

KOH AH CHUA AND OTHERS v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Murray-Anysley, C.J. Singapore, Spenser-Wilkinson and Brown, JJ.) October 29, 1947]

Evidence Enactment, Section 30 — Proved confession affecting person making it and other jointly under trial for same offence.

Although the Court may take into consideration the confession of a co-accused duly made before a Magistrate and proved at the trial, its weight is slight. Not being made on oath or subject to cross-examination, it is of even less weight than the evidence of an accomplice. A person making such a confession usually attributes the chief blame to others. Such evidence is not ordinarily sufficient without corroboration.

COURT OF CRIMINAL APPEAL.

The judgment of the Court of Appeal was delivered by :—

Murray-Aynsley, C. J. : — In this case the first three appellants were charged :—

> That you on the 12th day of February, 1947, at 3¾ milestone on the Muar, Tangkek Road, in the State of Johore, robbed one Chua Yok Hua of $6,000/- cash and that you thereby committed an offence punishable under section 392 of the Penal Code.

The fourth appellant was charged :—

> "That Koh Ah Chua, Tan Ban Chey and Goh Kim on the day and at the place above-mentioned robbed one Chua Yok Hua of $6,000/- cash, an offence punishable under section 392 of the Penal Code and that you Tan Peng Hong abetted the said Koh Ah